86-967

No._____

IN THE

Supreme Court of the United States

October Term, 1986

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, a corporation,

Petitioner,

vs.

DONALD E. BEISSEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

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68 pp

Question Presented

Whether, in an action brought pursuant to the Federal Employers Liability Act, the United States Court of Appeals for the Third Circuit erred by holding that a claim for absolute liability under the Safety Appliance Acts, 45 U.S.C. §§1-16, should have been submitted to the jury at trial where the railroad-owned vehicle involved was a highway vehicle which was modified for use on a railroad track, but was operated on a highway and was not being hauled or used on a track of the railroad at the time of the accident?

Parties to This Proceeding

All parties to this proceeding are listed in the caption.

The names of all parent companies and subsidiaries of Petitioner, Pittsburgh and Lake Erie Railroad Company, a corporation, are set forth as Appendix F to this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Pittsburgh and Lake Erie Railroad Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on September 15, 1986.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, at No. 85-3728, dated September 15, 1986, is not yet officially reported. A copy of that Opinion appears as Appendix A to this Petition.

The Order and Opinion of the United States District Court for the Western District of Pennsylvania, at Civil Action No. 84-858, dated November 27, 1985, also appears as Appendix B to this Petition.

Jurisdiction

Judgment in the United States District Court for the Western District of Pennsylvania was entered on October 22, 1985.

Judgment in the United States Court of Appeals for the Third Circuit was entered on September 15, 1986.

This Petition for Writ of Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory and Regulatory Provisions Involved

The following statutes are involved:

The Federal Employers Liability Act, Act of April 22, 1908, Section 1, 35 Stat. 65, as amended, 45 U.S.C. §51 *et seq.*

The Safety Appliance Acts, Act of March 2, 1893, ch. 196, 27 Stat. 531 (1893), 45 U.S.C. §§1-5, 7; Act of March 2, 1903, ch. 976, 32 Stat. 943 (1903), 45 U.S.C. §§8-10; Act of April 14, 1910, ch. 160, 36 Stat. 298 (1910), 45 U.S.C. §§11-12, 14-16.

The following regulations are involved:

49 C.F.R. §§231.25 and 231.26.

Pertinent portions of the texts of the above-referred provisions are printed as Appendix C and D to this Petition.

Statement of the Case

Respondent, Donald E. Beissel, brought this action in the United States District Court for the Western District of Pennsylvania against Petitioner, Pittsburgh and Lake Erie Railroad Company, for injuries he allegedly sustained in the course of his employment as a track supervisor with Petitioner (R.6a). Respondent invoked the jurisdiction of that court by alleging that his cause of action arose as a result of Petitioner's negligence, pursuant to the Federal Employers Liability Act, 45 U.S.C. §51 *et seq.*, and as a result of Petitioner's violation of the Safety Appliance Acts, 45 U.S.C. §§1-16 (R.6a; R.17a).

Petitioner responded to Respondent's allegations by acknowledging the applicability of the Federal Employers Liability Act and the jurisdiction of the district court to hear the matter, but denied that it was in any way negligent (R.8a; R.23a). Moreover, Petitioner denied that the Safety Appliance Acts were applicable to this case (R.23a).

Trial commenced before a jury and the following facts, relevant to this Petition, were adduced:

Petitioner employed Respondent as a track supervisor. On December 6, 1982, Respondent and another employee, Warren Mayfield, set out to deliver a 1969 Dodge van from one railroad workplace to another by driving it over various roads and highways between the two work locations (R.173a).

The van was what is referred to in railroad terminology as a highway-rail, or high-rail, vehicle. Generally, a high-rail vehicle is a typical highway vehicle equipped with a set of metal wheels (in addition to standard rubber tires) which enable it to be operated on a railroad track, as well

as the highway, at the option of the operator. This particular van was a ten passenger conventional van which was equipped with the above-described metal wheels (R.75a). The metal wheels could be lowered at a railroad track and highway crossing so that the van could travel along the track, using the rear rubber tires, which maintained contact with the rail, for propulsion (R.80a). However, at no time relevant to this case was the van operated on a railroad track (R.101a).

Respondent and Mayfield, partially through their journey, stopped at a convenience store for a coffee break (R.75a). The accident occurred when Respondent returned to the van from the store with his coffee and attempted to enter the van (R.87a). Respondent alleged that he was injured when he stepped onto the auxiliary step, which he claimed was loose, and as a result struck his back against the side of the van (R.175a; R.176a).

The auxiliary step had been attached to the van to ease access into the cab of the van when it sat on a railroad track (R.103a). This was necessitated by the fact that the van was raised above ground level by the height of the rail (R.103a). The step was attached at some point below the lowest step which was originally manufactured with the van. The lowest original step, when the van was on the ground and not the rail, was sixteen inches from the ground and the auxiliary step was only eight inches from the ground (R.103a; R.197a). As a result, Mayfield testified that he never used the auxiliary step except when the van was on the track (R.113a).

The district court, at the conclusion of the evidence, instructed the jury under the provisions of the Federal Employers Liability Act as to Respondent's negligence claim against Petitioner (R.51a). The district court

refused to instruct the jury under the provisions of the Safety Appliance Acts, holding those Acts to be inapplicable (R.375a; R.397a).

The jury returned a verdict for Petitioner (R.435a; R.438a).

The district court denied Respondent's post-trial motions which included, *inter alia*, a request for a new trial by reason of the refusal by the district court to instruct the jury that the Safety Appliance Acts were applicable (R.441a). The district court held that "plaintiff's contention that a motor vehicle being operated on a highway (not on a railroad track) is subject to the Safety Appliance Act (*sic*) is unsupported by authority, and that the Court's ruling at trial limiting the case to FELA was correct." (R.469a; R.470a.) The district court entered judgment on behalf of Petitioner on November 27, 1985 (R.469a; R.470a).

Respondent appealed to the United States Court of Appeals for the Third Circuit, raising certain allegations of error, one of which being the refusal by the district court to submit Respondent's claim under the Safety Appliance Acts to the jury. A three judge panel heard argument on the appeal on June 18, 1986.

On September 15, 1986, the Court of Appeals held that "the trial court erred when it refused to submit the Safety Appliance Acts claim to the jury. Consequently, we will reverse the entry of judgment on the Safety Appliance Acts claim and will remand the case for a new trial on that claim."[1] The Court affirmed the entry of judgment for Petitioner on the negligence claim brought pursuant to the Federal Employers Liability Act.[2]

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[1] Opinion of the Court of Appeals at page 17a.

[2] *Id.*

Argument

Petitioner seeks review by this Honorable Court on the basis that the United States Court of Appeals for the Third Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court. The holding of the Court of Appeals, and the sweeping language of its opinion, constitutes an unprecedented expansion, contrary to clear congressional intent, of the limited applicability of the Safety Appliance Acts (to certain types of railroad cars and vehicles used or hauled on railroad tracks) to include highway-rail vehicles in use on highways and possibly all railroad vehicles used on highways as an integral part of a railroad's operation. The Court erred by extending coverage to the vehicle involved and to the manner of its use.

The impact of such a decision on railroads will be economically severe. First, the decision below greatly expands the exposure of railroads to civil penalties in the form of fines pursuant to the mandate of the Safety Appliance Acts. Second, the decision below greatly expands the exposure of railroads to absolute liability in the event of injury claims and lawsuits. Third, the decision below will create confusion and uncertainty among railroads as they attempt to bring all manner and types of high-rail and highway vehicles into compliance with the requirements of the Safety Appliance Acts and the regulations promulgated thereunder.[3]

[3] Which, of course, can arguably include every railroad-owned highway vehicle since it can be said that each is used as an integral part of a railroad's operation.

Section 11 of the Safety Appliance Acts requires the placement of certain safety appliances on cars and provides in relevant part:

> It shall be unlawful for any common carrier subject to the provisions of sections 11 to 16 of this title *to haul, or permit to be hauled or used on its line,* any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: Provided, that in the loading and hauling of long commodities requiring more than one car, the handholds may be omitted on all save one of the cars while they are thus combined for such purpose.

45 U.S.C. §11 (emphasis added).[4] A violation of §11 subjects a railroad to a civil penalty of up to $2,500 for each violation.[5] Moreover, §11 imposes an absolute duty upon railroads to comply with the Acts and railroads will not be excused by a showing of due care.[6]

The plain intent of §11, and the sanctions imposed for a violation of it, is to protect railroad employees who work on and around rolling stock on the track of the railroad from the hazards associated with that work. The plain reading of the language contained in §11 ("on its line") supports Petitioner's contention that the Acts

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[4] The Safety Appliance Acts are reproduced in their entirety as Appendix C to this Petition and are hereinafter referred to as "Acts."

[5] 45 U.S.C. §§6, 13 (1982).

[6] *Myers v. Reading Company,* 331 U.S. 477 (1947); *Brady v. Terminal Rail Association of St. Louis,* 303 U.S. 10 (1938).

cover only on-track usage of certain types of vehicles.[7] The regulations promulgated pursuant to the Acts further support this contention.[8]

Nevertheless, the Court of Appeals, skirting the plain language of §11, stated as follows:

> The Section 11 language which requires use of a car on a carrier's 'line' need not be limited to the carrier's railroad track. Where use of its cars on the highway is an integral part of the railroad carrier's operation, the employer may not escape liability merely because an employee is unfortunate enough to be injured by a defective sill step while the vehicle is on the highway and not on rail.[9]

That language appears to extend the applicability of the Acts even further than the situation addressed in this case: where a dual-purpose vehicle, capable of on-rail and highway use, is used on a highway at the time of the accident. In fact, as pointed out by Judge Hunter in his concurring opinion, that language could be construed to indicate that the Court is extending coverage to all highway vehicles, regardless of their adaptability to on-rail use, so long as they are used as an integral part of a railroad's business.[10]

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[7] Such a plain reading is supported by the legislative history recited by Justice Burton in his dissenting opinion in *Baltimore & Ohio Railway v. Jackson*, 353 U.S. 325 (1957).

[8] 45 U.S.C. §12; 49 C.F.R. §231.25; 49 C.F.R. §231.26 and the note following §231.26 which provides: "Sections 231.25 and 231.26 are applicable only when the vehicles governed thereby are coupled together and moved together." Part 231, titled Railroad Safety Appliance Standards, cites as authority the Acts, 45 U.S.C. §§2, 4, 6, 8, 10, 11-16.

[9] Opinion of the Court of Appeals at page 9a. The Court of Appeals overlooks the fact that Petitioner, or any other railroad, will not escape liability if negligence is proved under the provisions of the Federal Employers Liability Act.

[10] Opinion of the Court of Appeals at page 18a.

The holding of the Court of Appeals is neither supported by precedent nor logic. Rather than construe the plain language of §11, the Court of Appeals legislated what it deemed to be the proper result. The Court intruded into an area properly left to Congress by expanding the scope and coverage of the Acts beyond what was intended.[11]

The impact of the decision below may be felt by every railroad in the country. The shear number of separate railroads currently operating in the United States which will be affected by that decision is significant. The Association of American Railroads, a voluntary, non-profit trade organization, has published data showing that in the year 1986 there were twenty-three individual Class I railroads operating in this country.[12] In addition, there were approximately 480 Class II and Class III line-haul railroads and switching and terminal companies operating.[13] It is reasonable to assume that literally thousands of high-rail and highway vehicles are in use every day by railroads across the country. The use of each such vehicle could possibly expose the railroad-owner to economic loss in the form of civil penalties and, in the case of personal injury, damages where, under principles of negligence, they might not otherwise lie.

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[11] The language of the opinion, quoted above in this Petition, is so broad and expansive in its extension of what is covered by the Acts that it caused Judge Hunter to concur in the result, but to write separately, rejecting "the majority's view that the vehicle is subject to the requirements of the Act (sic) simply because its use off the track was an integral part of the railroad carrier's operation." Opinion of the Court of Appeals at page 18a.

[12] Railroad Facts, Office of Information and Public Affairs, Association of American Railroads (September 1986). A railroad "class" is determined by annual operating revenues. A list of those railroads is attached as Appendix E to this Petition.

[13] *Id.*

The cumulative effect of such loss on the railroad industry could be catastrophic. In effect, the decision below will make railroads insurers of the safety of their employees when those employees are injured while using railroad owned vehicles, regardless of whether or not they are used on-rail. If such a system is to be instituted it must be legislated by Congress and not the courts. If the decision below is allowed to stand, the door is open for such judicial lawmaking.

Additionally, the sweeping language of the decision below, extending coverage of the Acts to off-track use of this type of high-rail vehicle and possibly to all highway vehicles used in the railroad's operation, will probably cause confusion as to compliance with the requirements of the Acts and the regulations promulgated thereunder. The Acts require that "cars" not only be equipped with sill steps, but also automatic couplers and grab irons.[14] Are railroads now required, in strict compliance with the mandate of the Acts and regulations, to install and maintain such safety appliances on, for example, high-rail vehicles which are never coupled with other vehicles, or on automobiles and similar vehicles because, under the language of the opinion below, they may fall within the coverage of the Acts? The plain language of the Acts and the clear intent of Congress is to cover certain types of vehicles while they are coupled together and running on the track of the railroad and the Court below erred by holding otherwise.

By so holding, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court because of the economic impact which will be felt by this nation's railroads and the difficulty of compliance by the railroads with safety statutory and regulatory requirements.

[14] 45 U.S.C. §§2,4 and 11.

Conclusion

For the foregoing reasons, it is respectfully requested that this Honorable Court grant this Petition for Writ of Certiorari because the decision of the United States Court of Appeals for the Third Circuit erroneously decided an important question of federal law which should be settled by this Court.

Respectfully submitted,

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Request for Entry of Appearance

SUPREME COURT OF THE UNITED STATES

No._____

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, a corporation,

Petitioner,

vs.

DONALD E. BEISSEL,

Respondent.

The Clerk will enter my appearance as Counsel of Record for Pittsburgh and Lake Erie Railroad Company, a corporation, Petitioner.

I certify that I am a member of the Bar of the Supreme Court of the United States.

By:_____

RICHARD D. KLABER, ESQ.
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Certificate of Service

I hereby certify that this 10th day of December, 1986, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Paul L. Hammer, Esquire, 518 Frick Building, Pittsburgh, Pennsylvania, 15219, counsel for Respondent.

I further certify that all parties required to be served have been served.

By:_____

RICHARD D. KLABER, ESQUIRE
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APPENDIX A

Opinion and Order of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3728

DONALD E. BEISSEL,

Appellant

vs.

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, a corporation

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 84-858)

Argued
June 18, 1986
Before: SEITZ, HUNTER and MANSMANN,
Circuit Judges.

(Filed September 15, 1986)

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Appendix A—Opinion and Order of the United States Court of Appeals for the Third Circuit.

OPINION OF THE COURT

MANSMANN, *Circuit Judge:*

The plaintiff appeals from a jury verdict in favor of the defendant in this case filed pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§51-60. The plaintiff, who allegedly suffered injuries in the course of his employment, challenges the trial court's refusal to submit to the jury a separate claim pursuant to the Safety Appliance Acts, 45 U.S.C. §§ 1-16, its refusal to instruct the jury on the doctrine of res ipsa loquitur, and its refusal to prohibit the testimony of a "surprise witness".

We find that the district court did not err in its rulings on the res ipsa loquitur charge or the testimony of the "surprise witness." We hold, however, that the district court did err when it refused to submit the Safety Appliance Acts claim to the jury. Accordingly, we will affirm the entry of judgment in favor of the defendant on the negligence claim but will remand the case for a new trial on the Safety Appliance Acts claim.

I.

The plaintiff allegedly sustained back injuries in the course of his employment when he slipped on the step of the defendant's 1969 Dodge van. The van had been converted for use on both the highway and on the rails. This conversion included the additions of extra wheels designed to fit on railroad tracks and of footboards or sill steps.

At the time of the accident, the plaintiff and Warren Mayfield, both employees of the defendant, were assigned to transport the high/rail vehicle by highway from Glassport to McKees Rocks, Pennsylvania. The two men had stopped at a

convenience store and were returning to the van with coffee when the plaintiff was injured.

Mr. Mayfield testified that, at the time of the accident, he was not looking at the plaintiff but was concentrating instead on his efforts to tear a hole in the lid of his coffee cup. The plaintiff testified that, having placed his cup of coffee on the shelf inside the van, he put his right foot on the sill step and his left foot on the step of the van. The plaintiff claims that the sill step then gave way and that he was injured in the resulting fall.

The plaintiff filed suit against the defendant pursuant to the FELA, alleging negligence and a violation of the Safety Appliance Acts. The trial judge refused to submit the Safety Appliance Acts claim to the jury, charging only on the negligence claim. The jury returned a verdict in favor of the defendant. The trial court denied the plaintiff's subsequent motions for a new trial and for judgment notwithstanding the verdict.

The plaintiff appeals alleging that the district court erred in refusing to send the plaintiff's Safety Appliance Acts claim to the jury, that the court improperly refused to charge the jury on the doctrine of res ipsa loquitur, and that the court erred in permitting a "surprise witness" to give prejudicial and irrelevant testimony.

II.

The trial court refused to submit to the jury the plaintiff's claim that the defendant should be found liable for the plaintiff's injuries because those injuries resulted from a violation of the Safety Appliance Acts ("Acts"). The plaintiff contends that the defendant violated a regulation issued pursuant to Section 11 of the Acts, 49 C.F.R. § 231.25(c), when it permitted its employees to use the multi-purpose vehicle equipped

with a sill step which allegedly was not securely fastened.

The defendant does not contest the plaintiff's assertion that the record contains sufficient evidence to support a determination that the step was loose. The defendant argues instead that the Safety Appliance Acts were not applicable to the vehicle because the van was not on a railroad track at the time of the incident.

The Safety Appliance Acts impose an absolute duty on railroad carriers to maintain the required safety equipment on their vehicles. *See Lilly v. Grand Trunk Western Railroad Company*, 317 U.S. 481, 485-86 (1943). An employee who is injured by reason of a violation of the Acts may pursue a cause of action against the carrier pursuant to the FELA. *Id.* at 485. In short, the Safety Appliance Acts provide the basis for the claim, and the FELA provides the remedy. T.J. Lewis, Jr., *Federal Employers Liability Act*, 14 S.C.L.Q. 447, 452 (1962).

If the Acts were applicable to the multi-purpose vehicle at the time of the incident, the trial court erred in refusing to charge the jury on the Safety Appliance Acts claim. The standard of proof required of a plaintiff alleging a Safety Appliance Acts claim is less stringent than for an FELA negligence claim. Thus, irrespective of our resolution of the negligence claim, an error in the court's refusal to submit the Safety Appliance Acts question to the jury would require a remand for a new trial on that portion of the complaint.

Section 11 of the Acts provides, in relevant part:

> It shall be unlawful for any common carrier subject to the provisions of sections 11 to 16 of this title *to haul, or permit to be hauled or used on its line*, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps . . . .

45 U.S.C. § 11 (emphasis added). Section 12 of the Acts gives the Secretary of Transportation authority to issue appropriate regulations and provides that "it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Secretary." 45 U.S.C. § 12.

Prior to the 1957 decision of the Supreme Court of the United States in *Baltimore & Ohio Railway Company v. Jackson*, the Interstate Commerce Commission[1] ("ICC") did not consider "track motor cars," a category which includes high/rail vehicles, to be subject to the provisions of the Safety Appliance Acts. 353 U.S. 325, 330 (1957) ("*Jackson*"); Applicability of Safety Regulations to Track Motor Cars and Push Trucks, 325 I.C.C. 722, 724 (1965). In *Jackson*, the Supreme Court held that a track motor car and the hand car to which it was coupled were within the scope of the Safety Appliance Acts:

> The power or train brake provisions of the Safety Appliance Acts apply to the motor track car and the coupling and brake requirements to the hand car when they are employed in the manner here involved [the motor track car was hauling the hand car on the defendant's railroad track].

Jackson, 353 U.S. at 328.

The *Jackson* Court did not decide, however, whether similar track motor cars or hand cars, if used separately, were governed by those sections of the Acts. The Court explained: "If used separately, though we do not pass on the question, it may well be that entirely

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1. Power to enforce the Safety Appliance Acts was originally vested in the Interstate Commerce Commission. In 1966, those duties were shifted to the Secretary of Transportation. 49 U.S.C. § 1655(e)(1).

different sections of the Acts might apply to each of the vehicles." *Id.*

The ICC, in response to the *Jackson* decision, instituted rulemaking proceedings for the purpose of promulgating regulations consistent with the Court's interpretation of the Safety Appliance Acts. Applicability of Safety Regulations to Track Motor Cars and Push Trucks, 325 I.C.C. 722, 722 (1966). These proceedings culminated in the promulgation of 49 C.F.R. §§ 231.25 & 231.26. The portions of the regulations which are pertinent to this appeal specify:

> § 231.25 Track Motorcars (self-propelled 4-wheel cars which can be removed from the rails by men).
>
> . . . .
>
> (c) *Sill steps or footboards.* Each track motorcar shall be equipped with safe and suitable sill steps or footboards conveniently located and securely fastened to car when bed or deck of track motorcar is more than 24 inches above top of rail.

A "note" which follows Section 231.26 provides: "Sections 231.25 and 231.26 are applicable only when the vehicles governed thereby are coupled together and moved together."

The apparent intent of the ICC was to limit the scope of the regulations. Thus, because the *Jackson* Court expressly declined to consider whether track motor cars which are operated separately are governed by the Acts, the Commission did not address such operation of track motor cars in its rulemaking proceeding and specifically included the note limiting the regulations to cars coupled and moved together. Similarly, although it conceded that the term track motor car encompasses high/rail vehicles among

others, the Commission directed its regulations to a more limited group of cars, *i.e.*, "self-propelled 4-wheel cars which can be removed from the rails by men." *See* Applicability of Safety Regulations to Track Motor Cars and Push Trucks, 325 I.C.C. 722, 724-25 (1965); *cf.* Applicability of Safety Regulations to Track Motor Cars and Push Trucks, Report & Order of Hearing Examiner, I.C.C. docket No. 32248, at 4 (February 10, 1965) (Vinskey, Henry J.) ("Although there are other self-propelled maintenance-of-way vehicles which are comparable to or related to track motor cars, such as rail highway automobiles and trucks, weed burners, cranes and others, they are not within the scope of this proceeding.").

The ICC did indicate, however, that vehicles which do not fall precisely within the scope of 49 C.F.R. § 231.25 may nonetheless be subject to the provisions of the Acts. With respect to the vehicles not covered by the *Jackson*-initiated rulemaking, the Commission's hearing examiner wrote: "[A]ttention is called to Section 131.18 [now 231.18] of the United States Safety Appliance Standards which applies to cars of special construction not specifically covered by the standards." Applicability of Safety Regulations to Track Motor Cars and Push Trucks, Report & Order of Hearing Examiner, I.C.C. docket no. 32248, at 4 (February 10, 1965) (Vinskey, Henry J.). Section 231.18 provides:

> Cars of construction not covered specifically in the foregoing sections in this part, relative to handholds, sillsteps, ladders, handbrakes, and running boards may be considered as of special construction, but shall have, as nearly as possible, the same complement of handholds, sillsteps, ladders, handbrakes and running-boards as are required for cars of the nearest approximate type.

49 C.F.R. § 231.18.

This regulation seemingly requires that high/rail vehicles comply, as nearly as possible, with the Section 231.25 requirements. The sill step allegedly involved in the plaintiff's injury was, in fact, apparently designed to satisfy the provisions of Section 231.25(c).

We can find no reasonable justification for excluding high/rail vehicles operated separately from the provisions of 49 C.F.R. §§ 231.18 & 231.25(c) or from the dictates of Section 11 of the Acts. Unlike the regulations governing couplers, the requirements for sill steps are based on considerations not necessarily linked to the movement of a coupled "train". Our reading of Section 11 of the Acts reveals no language limiting the application of its requirements to coupled cars. Section 11 addresses any car "hauled or used" on a carrier's "line". 45 U.S.C. § 11. While the *Jackson* Court did not extend its ruling on couplers and power brakes to uncoupled vehicles, it certainly did not preclude the application of the Acts to such cars. It merely suggested that the applicable sections of the Acts might vary where a car was used separately and not as a "train."

Having decided that an uncoupled high/rail vehicle is subject to the sill step requirements of Section 11 of the Safety Appliance Acts, we confront the more difficult issue presented by a claim involving a high/rail vehicle which is in use on the highway and not on the rails. The defendant argues that the scope of the Section 11 requirements is limited to vehicles in use on railroad tracks. The defendant focuses on the language of Section 11 which directs its provisions to carriers which haul or use any car "on its line." The defendant argues that the plain meaning of this language prevents Section 11's application to the vehicle at issue which "was not hauled [or] . . . used on any line of the P&LE or any other railroad." The defendant contends

that the language's clear meaning reflects Congress' concern with the hazards to railroad employees who worked on or around locomotives, cars or similar vehicles in use on the track and, in certain circumstances, in railroad yards.

When it enacted Section 11 in 1910, Congress undoubtedly had not contemplated the use of high/rail vehicles. As it focused on the generally deplorable safety conditions of the nation's railroad industry, however, Congress used broad terms to define the scope of its pronouncements. As the Supreme Court of the United States noted in *Johnson v. Southern Pacific Company*, with respect to the term "car": "There is nothing to indicate that any particular kind of car was meant. Tested by context, subject matter and object, 'any car' meant all kinds of cars running on the rails, including locomotives." 196 U.S. 1, 15-16 (1904) (quoted in *Jackson*, 353 U.S. at 331-32).

The advent of the high/rail vehicle, which is capable of unassisted movement on both rail and highway, although not contemplated in the legislative history, may nonetheless fall within the statute's scope. The Section 11 language which requires use of a car on a carrier's "line" need not be limited to the carrier's railroad track. Where use of its cars on the highway is an integral part of a railroad carrier's operation, the employer may not escape liability merely because an employee is unfortunate enough to be injured by a defective sill step while the vehicle is on the highway and not on rail.

Our reading of the statute is also consistent with Section 12 of the Acts which provide that "it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Secretary." 45 U.S.C. § 12.

Despite the defendant's arguments to the contrary,

nothing in our decision in *Patton v. Baltimore & Ohio Railroad Company*, 197 F.2d 732 (3d Cir. 1952), precludes this result. In *Patton*, we reversed the imposition of liability against a company which had transferred the defective vehicles to another private railroad company with its own capacity to repair defective cars. *Id.* at 740-41. We held only that "[t]he Act did not provide that ownership or *prior* use by the railroad of a car or cars with insufficient brakes would serve as the basis for the absolute liability imposed on the carrier by the Act." *Id.* at 741 (emphasis in original). The high/rail vehicle in question here was concededly always in the possession of the defendant and was being operated on the defendant's instructions. This is not the case of a car which has been taken off the line for repair or because it is out of service. The defendant's van was being used in the regular course of business, on both rail and highway. The defendant had equipped the vehicle for rail and provided the required sill steps. So long as it continued to use the multi-purpose vehicle in this dual capacity, it was required by Section 11 of the Safety Appliance Acts to maintain a secure step.

We hold, therefore, that the district court erred in failing to charge the jury on the Safety Appliance Acts claim and that this error warrants a new trial.

III.

The plaintiff contends that the trial court erred in refusing to instruct the jury on the doctrine of res ipsa loquitur. In the relevant point for charge, the plaintiff requested that the trial court instruct the jury as follows:

> If Mr. Beissel was injured in an unusual happening arising from conditions at his work for the P&LE, the burden of proof is shifted to the P&LE and the P&LE must come forward with

> evidence to show that it was not negligent. [Citations omitted.]

The defendant argues, in response, that the plaintiff waived his right to raise this issue on appeal because the requested instruction does not fully and completely set forth the elements of res ipsa loquitur. The defendant maintains in the alternative that the facts of this case do not warrant a res ipsa loquitur charge.

We find that the plaintiff did not waive his right to challenge the district court's refusal to include a res ipsa loquitur instruction in its charge. We also find that on the facts of this case the court did not err in denying such a charge.

Whatever the alleged inadequacies of the proposed charge as written, the trial court clearly interpreted it as a request for a res ipsa loquitur instruction. At the time the request was denied, there was no suggestion that the language of the charge was erroneous or that it was not a complete statement of the law. Indeed, at the sidebar conference on the points for charge the plaintiff's counsel and the trial court had the following exchange:

> MR. HAMMER: You are not going to instruct on res ipsa loquitur?
>
> THE COURT: No, I don't, except maybe I will say that when things break down that are not supposed to break down if properly maintained - -
>
> MR. HAMMER: They may infer that there is negligence.
>
> THE COURT: (Continuing) They may make an inference from that, yes.
>
> MR. HAMMER: Okay. So I may argue that?

> THE COURT: But that's probably one time I would prefer to avoid -- unusual for me -- the Latin phrase res ipsa loquitur, or even the other equivalent, exclusive control.

The plaintiff's counsel later clarified his objection to the trial court's ruling: "I except to the refusal to give a res ipsa loquitur charge."

At argument on the post-trial motions, the plaintiff's counsel argued that "it is reversible error in an FELA case to refuse to give a res ipsa loquitur charge." The district court clearly indicated that, in its view, the plaintiff had requested a res ipsa loquitur charge and that it had been denied.

> THE COURT: There is no doubt as to the fact that you requested such a charge.
>
> MR. HAMMER: Yes, and I think there is no doubt that you refused the charge.
>
> THE COURT: There is no doubt it was not granted.

Again, there was no suggestion by the defendant at that time that the plaintiff had not properly requested a res ipsa loquitur charge. We find that the plaintiff did not waive his right to contest on appeal the trial court's denial of the res ipsa loquitur charge.

With respect to the merits of the court's refusal to charge the jury on the doctrine of res ipsa loquitur, the plaintiff argues that the trial court erred in finding that the facts of this case did not warrant such a charge. The defendants, however, contend that several elements of the doctrine are not satisfied by the facts of record.

The essential elements of the res ipsa loquitur doctrine were set forth by the Supreme Court of the United States when it first applied the doctrine to an FELA action. *Jesionowski v. Boston and Maine*

Railroad, 329 U.S. 452, 456 (1947) (quoting *San Juan Light & Transit Company v. Requena*, 224 U.S. 89, 98-99 (1912). The Court said:

> [W]hen a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care.

Id. Thus, an inference of causation based on the res ipsa loquitur doctrine requires that (1) the event be of a kind which ordinarily does not occur in the absence of negligence, (2) other responsible causes, including conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence, and (3) the indicated negligence is within the scope of the defendant's duty to the plaintiff. Restatement (Second) of Torts, § 328D (1965).

The district court rejected the plaintiff's request for a res ipsa loquitur charge, reasoning: "[I]t seems to me that this sounds like one of the usual cases of accidents on the railroad, rather than something unusual, like the case where one wheel of a car was on the left-hand switch and the other one on the right-hand switch." The court apparently found that the plaintiff had not satisfied the requirement of demonstrating that the injury was one which does not ordinarily occur in the absence of the negligent control of the thing causing the injury.

The trial judge compared the facts of this case to those of *Jesionowski*. In *Jesionowski*, a railroad employee was killed by a train which derailed. The derailment could have been attributed either to the deceased's improper operation of a switch or the

employer's negligent maintenance of equipment called a "frog." The Supreme Court held that the doctrine of res ipsa loquitur could be applicable if the evidence demonstrated that the deceased had not been at fault.

While the *Jesionowski* incident may be appropriately characterized as one which does not ordinarily occur when the employer, who has control of the instrumentality which caused the accident and exercises proper care, the facts of the appeal before us do not support such a conclusion. The trial court was correct in its observation that the plaintiff's injury was one which may be considered usual or common: it is the type of event which could easily occur in the absence of the defendant's negligence.

The defendant did argue at trial that the plaintiff's actions contributed to or caused the accident. We cannot say, as we did in *Knight v. Otis Elevator Company*, 596 F.2d 84, 90-91 (3d Cir. 1979), that there is insufficient evidence that the actions of the plaintiff contributed to plaintiff's injuries. We cannot say with certainty, as we did in *Fassbinder v. Pennsylvania Railroad Company*, 322 F.2d 859, 861 (3d Cir. 1963) (in banc), that one of the mechanisms, over which the defendant had exclusive control, was the precipitating cause of the accident.

Consequently, we find that the district court did not err in denying the plaintiff's request for a res ipsa loquitur charge.

IV.

The plaintiff's final contention is that he is entitled to a new trial because the district court abused its discretion in permitting testimony by William McCracken, a defense witness whose name did not appear on the list of witnesses required by the pre-trial order.

It is well established that departure from or

adherence to the pretrial order is a matter peculiarly within the discretion of the trial judge. *Berroyer v. Hertz*, 672 F.2d 334, 338 (3d Cir. 1982). The decision to permit or to exclude testimony by a non-listed witness will not be disturbed absent a clear abuse of discretion. *Id.* The criteria for evaluating such an exercise of discretion are: (1) the prejudice or surprise in fact to the opposing party, (2) the ability of the party to cure the prejudice, (3) the extent of disruption of the orderly and efficient trial of the case, and (4) the bad faith or willfulness of the non-compliant party. *Id.* In applying these standards to the facts of this case we find that the trial court did not abuse its discretion in allowing McCracken to testify.

The sequence of testimony leading to the defendant's request to call Mr. McCracken may be summarized as follows. On direct examination by his own attorney, the plaintiff testified to back problems in 1965 or 1966 as a result of which he was advised by his doctor to seek lighter duty work. The plaintiff stated that upon his request for lighter work the defendant assigned him to a job which, though less strenuous, still required him to swing sledge hammers weighing from eight to sixteen pounds. At a later point in the trial, the plaintiff was called as a witness for the defense. On direct examination by the defense attorney, the plaintiff was asked if he recalled that in 1974 the defendant through Mr. McCracken and Mr. Netherton, the defendant's general manager, had offered the plaintiff the opportunity to move inside to a lighter job. The plaintiff replied that he did not recall the offer.

The defendant offered Mr. McCracken's testimony to "refute Mr. Beissel's testimony that he was not offered a job in 1974." The plaintiff objected to the offer, first, because Mr. McCracken was an unlisted witness and, second, because the plaintiff had not

denied the job offer but merely testified that he didn't recall it. The trial court permitted Mr. McCracken to testify, commenting that the testimony might refresh the plaintiff's recollection. Mr. McCracken testified on direct examination that he and Mr. Netherton had offered the plaintiff a position in the drafting room in 1974.

While the plaintiff may have been surprised that Mr. McCracken was called to testify, he does not claim prejudice from the substance of Mr. McCracken's testimony on direct. The plaintiffs' principal allegation of unfairness involves an expression of opinion by Mr. McCracken in response to a question.

During cross-examination by the plaintiff's attorney, Mr. McCracken testified generally that in 1974 the plaintiff had refused the offer of lighter work and had continued to perform his prior job satisfactorily. Then the following exchange occurred:

> "Q. And, so, you and Mr. Netherton had gone through this preparation and meeting and that, when it wasn't needed at all.
>
> A. I wouldn't say that."

The plaintiff's counsel posed no further questions, and the defendant's attorney immediately asked on redirect: "What would you say, Mr. McCracken?" Mr. McCracken answered, "I don't think we would be here now if that were the case." The plaintiff objected to the answer as speculative, the trial judge agreed and struck the response.

The plaintiff's principal allegation of unfairness is that the expression of this opinion by Mr. McCracken had a prejudicial impact upon the jury the strength of which is not apparent from the "cold record." We agree with the plaintiff that the record on its face does not reveal significant prejudice from Mr. McCracken's

response. Furthermore, even if we assume that some prejudicial impact is lost in transcription, we must next evaluate the plaintiff's ability to cure the prejudice. The plaintiff merely objected to the answer, and the trial judge responded by striking it. The plaintiff made no further attempt to minimize its impact, *e.g.* by requesting an instruction that the jury disregard the answer or by moving for a mistrial.

The record reveals no possibility of substantial prejudice to the plaintiff and no further attempt by the plaintiff to cure any perceived prejudice. We find that the trial court did not abuse its discretion in departing from the pretrial order and in allowing Mr. McCracken to testify.

V.

Because we reject the plaintiff's contention that the district court erred in refusing to charge the jury on the doctrine of res ipsa loquitur and in permitting the testimony of Mr. McCracken, we will affirm the entry of judgment in favor of the defendant on the negligence claim.

We hold, however, that the trial court erred when it refused to submit the Safety Appliance Acts claim to the jury. Consequently, we will reverse the entry of judgment on the Safety Appliance Acts claim and will remand the case for a new trial on that claim.

HUNTER, *Circuit Judge*, concurring

We agree with the majority that the Safety Appliance Act applies in this case. Although Mr. Beissel was injured when the vehicle in question, the high/rail car, was not on the railroad tracks, the vehicle was subject to the requirements of the Act because it was

used both on and off the tracks. We write separately to note that we do not agree with the majority's view that the vehicle is subject to the requirements of the Act simply because its use off the track was an integral part of the railroad carrier's operation. A vehicle that was used as an integral part of the operation but that was never used on the tracks, would not, in our view, be covered by the Act.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

Order of the United States District Court for the Western District of Pennsylvania

IN THE
UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

DONALD E. BEISSEL,

Plaintiff,

vs.

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, a corporation,

Defendant.

Civil Action No. 84-858.

ORDER

AND NOW, this 27th day of November, 1985, upon consideration of plaintiff's motion for new trial, after argument, and the Court being of opinion that plaintiff's contention that a motor vehicle being operated on a highway (not on a railroad track) is subject to the Safety Appliance Act is unsupported by authority, and that the Court's ruling at trial limiting the case to FELA was correct (Tr. 160-64, 200); and that the other grounds asserted for new trial are without merit; [in particular the contention that the Court failed to include in its charge an instruction "that the defendant is liable to the plaintiff for all of the injuries he has incurred, in whole or

part, because of the accident of December 6, 1982" (Tr. 198), when the Court in fact charged at length on the point of causation and that defendant was liable for such, but only such, injuries as resulted from the accident of December 6, 1982 (Tr. 245-50)] and that the cause was fully and fairly submitted to the jury after trial by able counsel under an adequate and sufficient charge; and that the jury's verdict was supported by substantial evidence;

IT IS ORDERED that said motion be and the same hereby is denied, and that the judgment heretofore entered in accordance with the verdict shall stand and remain in full in force and effect as the considered judgment of the Court.

EDWARD DUMBAULD
Edward Dumbauld
United States Senior District Judge

Copies to:

Paul L. Hammer, Esquire
518 Frick Bldg. (15219)

Richard D. Klaber, Esquire
Dickie, McCamey & Chilcote
Two PPG Place (15222)

APPENDIX C

Safety Appliance Acts, 45 U.S.C. §§1-16

Act of March 2, 1893, ch. 196,
27 Stat. 531 (1893)
(codified at 45 U.S.C. §§1-5, 7 (1892))

CHAP. 196.—An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

March 2, 1893.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Driving-wheel brakes required on locomotives in interstate commerce.

Train-brake system.

Automatic couplers required on all cars.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Complying companies, etc., may refuse insufficiently equipped cars from connecting lines, etc.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars as required by this act.

Grab irons, etc.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the center of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

American Railway Association to determine standard height drawbars for freight cars.

Maximum variation.

Certificate.

Notice of standard.

Interstate Commerce Commission to fix standard on failure of Association.

Operative date.

Noncoupling cars excluded from traffic.

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of

Penalty for violation.

the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred. And it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

District Attorney to bring suit in United States courts.

Interstate Commerce Commission to lodge information.

Proviso. Exception.

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Extension of time for compliance.

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Employees injured by noncomplying cars, ect., do not assume the risk.

Approved. March 2, 1803.

Appendix C—Safety Appliance Acts, 45 U.S.C. §§1-16.

Act of March 2, 1903, ch. 976, 32 Stat. 943 (1903) (codified at 45 U.S.C. §§8-10 (1982))

March 2, 1903.
[Public, No. 133.]

CHAP. 976.—An Act To amend an Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

Automatic brakes and couplers. Requirements for, extended. Vol. 27, p. 531. *Post*, p. 1107.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same

Vol. 29, p. 85.

kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

Exceptions.

SEC. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate-Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as

Minimum number of cars.

Increase of percentage.

aforesaid; and failure to comply with any such requirement of the said Interstate-Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

In effect September 1, 1903. Requirements of former act continued.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate-Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

Vol. 27, p. 531.

Approved. March 2, 1903.

Appendix C—Safety Appliance Acts, 45 U.S.C. §§1-16.

Act of April 14, 1910, ch. 160, 36 Stat. 298 (1910)
(codified at 45 U.S.C. §§11-12, 14-16 (1982))

April 14, 1910.
[H. R. 5702]
[Public, No. 133.]

CHAP. 160.—An Act To supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

Railway safety appliances.
Application of laws.
Vol. 27, p. 531; Vol. 29, p. 53; Vol. 32, p. 943.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

Common carriers.
Equipment required after July 1, 1911, on all cars hauled by.

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with

Sill steps and hand brakes.

secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure

running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Ladders and running board.
Hand holds or grab irons.
Proviso,
Long commodities.

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: *Provided*, That the

Standard equipment required in six months.

Vol. 27, p. 531.

Penalty.

Proviso.

Extension of period. *Post*, p. 1397.

Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said commission is hereby given authority, after hearing, to

Modifying standard draw bars.

modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission.

Penalty for violations.

Vol. 27, p. 532; Vol. 20, p. 85; Vol. 32, p. 943.

Proviso.

SEC. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: *Provided*, That where any car shall have been properly equipped, as

provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

Hauling defective cars for necessary repairs.

Risk of carrier.

Use of chains limited.

Liability for hauling defective cars except for repairs.

SEC. 5. That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act.

Vol. 27, p. 531; Vol. 29, p. 85; Vol. 32, p. 943.

Enforcement by Interstate Commerce Commission.

SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said commission are hereby extended to it for the purpose of the enforcement of this Act.

Approved, April 14, 1910.

Appendix C—Safety Appliance Acts, 45 U.S.C. §§1-16.

45 U.S.C. §§1-16 (1982)

§1. Driving-wheel brakes and appliances for operating train-brake system

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Mar. 2, 1893, c. 196, §1, 27 Stat. 531.

§2. Automatic couplers

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Mar. 2, 1893, c. 196, §2, 27 Stat. 531.

§3. Refusal of insufficiently equipped cars from connecting lines

When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this title, it may lawfully refuse to receive from connecting lines of road or

shippers any cars not equipped sufficiently, in accordance with said section, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by sections 1 to 7 of this title.

Mar. 2, 1893, c. 196, §3, 27 Stat. 531.

§4. *Grab irons or handholds for security in coupling and uncoupling cars*

Until otherwise ordered by the Secretary of Transportation, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Mar. 2, 1893, c. 196, §4, 27 Stat. 531.

§5. *Standard height of drawbars for freight cars; noncomplying cars excluded from traffic*

No freight cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the prescribed standard as to height of drawbars.

Mar. 2, 1893, c. 196, §5, 27 Stat. 531.

§6. *Failure to equip cars as provided; duty of United States attorneys and Secretary of Transportation; exceptions from operation of provisions*

Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1 to 7 of this title, shall be liable to a penalty of

not less than $250 and not more than $2,500 for each and every such violation, to be assessed by the Secretary of Transportation and recovered in a suit or suits to be brought by the United States attorney in the district court of the United States for the judicial district in which such violation occurred or in which the defendant has its principal executive office; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Secretary of Transportation to lodge with the proper United States attorneys information of any such violations as may come to his knowledge: *Provided,* That nothing in sections 1 to 7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

(As amended July 8, 1976, Pub.L. 94-348, §3(a), 90 Stat. 818; Nov. 2, 1978, Pub.L. 95-574, §7(a), 92 Stat. 2461; Oct. 10, 1980, Pub.L. 96-423, §8(b), 94 Stat. 1814.)

§7. *Assumption of risk by employees*

Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision of sections 1 to 7 of this title shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Mar. 2, 1893, c. 196, §8, 27 Stat. 532.

§8. Provisions of certain sections extended

The provisions and requirements of sections 1 to 7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grabirons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways.

Mar. 2, 1903, c. 976, §1, 32 Stat. 943.

§9. Power or train brakes; operation by engineer; rules for installation, inspection, maintenance, and repair

Whenever, as provided in sections 1 to 7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Secretary of Transportation may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes

used and operated as aforesaid. The rules, standards, and instructions of the Association of American Railroads, adopted in 1925 and revised in 1933, 1934, 1941, and 1953, with such revisions as may have been adopted prior to the date of enactment of the Power or Train Brakes Safety Appliance Act of 1958, for the installation, inspection, maintenance, and repair of all power or train brakes for common carriers engaged in interstate commerce by railroad shall remain the rules, standards, and instructions for the installation, inspection, maintenance, and repair of all power or train brakes unless changed, after hearing, by order of the Secretary of Transportation: *Provided, however,* That such rules or standards or instructions or changes therein shall be promulgated solely for the purpose of achieving safety. The provisions and requirements of this section shall apply to all trains, locomotives, tenders, cars, and similar vehicles used, hauled, or permitted to be used or hauled, by any railroad engaged in interstate commerce. In the execution of this section, the Secretary of Transportation may utilize the services of the Association of American Railroads, and may avail himself of the advice and assistance of any department, commission, or board of the United States Government, and of State governments, but no official or employee of the United States shall receive any additional compensation for such service except as now permitted by law. Failure to comply with any rule, regulation, or requirement promulgated by the Secretary of Transportation pursuant to the provisions of this section shall be subject to the like penalty as failure to comply with any requirement of this section.

Mar. 2, 1903, c. 976, §2, 32 Stat. 943; Apr. 11, 1958, Pub.L. 85-375, 72 Stat. 86.

§10. Former duties, requirements, and liabilities continued unless specifically amended

Nothing in sections 8 and 9 of this title shall be held or construed to relieve any common carrier, the Secretary of Transportation, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements of sections 1 to 7 of this title, and all of such provisions, powers, duties, requirements, and liabilities shall, except as specifically amended by sections 8 and 9 of this title, apply thereto.

Mar. 2, 1903, c. 976, §3, 32 Stat. 943; June 25, 1948, c. 646, §1, 62 Stat. 909.

§11. Safety appliances required for each car; when hand brakes may be omitted

It shall be unlawful for any common carrier subject to the provisions of sections 11 to 16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Apr. 14, 1910, c. 160, §2, 36 Stat. 298.

§12. Safety appliances, as designated by the Secretary of Transportation to be standards of equipment; modification of standard height of drawbars

The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Secretary of Transportation shall remain as the standards of equipment to be used on all cars subject to the provisions of sections 11 to 16 of this title, unless changed by an order of said Secretary of Transportation to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Secretary of Transportation shall be subject to a like penalty as failure to comply with any requirement of sections 11 to 16 of this title. Said Secretary is given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Secretary.

Apr. 14, 1910, c. 160, §3, 36 Stat. 298.

§13. Penalty for using car not equipped as provided; hauling car for repairs where equipment becomes defective; liability for death or injury of employee; use of chains instead of drawbars

Any common carrier subject to sections 11 to 16 of this title using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of said sections not equipped as provided in said sections, shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every such violation, to be assessed by the Secretary of Transportation and recovered as provided in section 6 of this title: *Provided*, That where any car shall have been properly equipped, as provided in sections 1 to 16 of this title, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point on the line of railroad on which the car was discovered to be defective or insecure where such car can be repaired, or, at the option of a connecting carrier, such car may be hauled to the nearest available point on the line of such connecting carrier where such car can be repaired if such point is no farther than the nearest available point on the line on which the car was discovered defective or insecure, without liability for the penalties imposed by this section or section 6 of this title, if any such movement is necessary to make such repairs and such repairs cannot be made except at any such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier doing the moving or hauling, and nothing in this section shall be construed to relieve such carrier

from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of sections 1 to 16 of this title; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain livestock or "perishable" freight.

(As amended July 8, 1976, Pub.L. 94-348, §3(b), 90 Stat. 818; Nov. 2, 1978, Pub.L. 95-574, §7(b), 92 Stat. 2461; Jan. 14, 1983, Pub.L. 97-468, Title VII, §704, 96 Stat. 2580.)

§14. Liability for using car with defective equipment, except as specified

Except that, within the limits specified in section 13 of this title the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in sections 11 to 16 of this title shall be held or construed to relieve any common carrier, the Secretary of Transportation, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements heretofore set out in sections 1 to 10 of this title; and, except as aforesaid, all of such provisions, powers, duties, requirements, and liabilities shall apply to sections 11 to 16 of this title.

Apr. 14, 1910, c. 160, §5, 36 Stat. 299.

Appendix C—Safety Appliance Acts, 45 U.S.C. §§1-16.

§16. Application of provisions to common carriers and vehicles subject to "Safety Appliance Acts"

The provisions of sections 11 to 16 of this title, as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the "Safety Appliance Acts" set out in sections 1 to 10 of this title.

Apr. 14, 1910, c. 160, §1, 36 Stat. 298.

APPENDIX D

49 Code of Federal Regulation §§231.25 and 231.26

§231.25 Track motorcars (self-propelled 4-wheel cars which can be removed from the rails by men).

(a) *Handbrakes (includes foot operated brake).* Each track motorcar shall be equipped with an efficient handbrake so located that it can be safely operated while the car is in motion. Each handbrake shall be equipped with a ratchet or other suitable device which will provide a means of keeping the brake applied when car is not in motion.

NOTE: The requirements of this rule will be satisfied if the ratchet or other suitable device operates in connection with at least one handbrake on track motorcars that may be equipped with more than one such brake.

(b) *Handholds.* One or more safe and suitable handholds conveniently located shall be provided. Each handhold shall be securely fastened to car.

(c) *Sill steps or footboards.* Each track motorcar shall be equipped with safe and suitable sill steps or footboards conveniently located and securely fastened to car when bed or deck of track motorcar is more than 24 inches above top of rail.

(d) *Couplers.* When used to haul other cars, each track motorcar shall be equipped with a coupler at each end where such cars are coupled (1) which provides a safe and secure attachment, (2) which can be coupled or uncoupled without the necessity of men going between the ends of the cars.

Appendix D—49 Code of Federal Regulation §§231.25 and 231.26.

§231.26 Pushcars.

(a) *Handbrakes.* When used to transport persons, each pushcar shall be equipped with an efficient handbrake so located that it can be safely operated while the car is in motion.

(b) *Handholds (includes handles).* Each pushcar shall be provided with one or more secure handholds. When used to transport persons, each pushcar shall be provided with one or more safe and suitable handholds conveniently located above the top of the bed of each pushcar.

(c) *Sill steps or footboards.* When used to transport persons, each pushcar shall be equipped with safe and suitable sillsteps or footboards conveniently located and securely fastened to car, when bed or deck of pushcar is more than 24 inches above top of rail.

(d) *Couplers.* When moved together with other vehicles, each pushcar shall be equipped with a coupler at each end where such vehicles are coupled (1) which provides a safe and secure attachment, and (2) which can be coupled or uncoupled without the necessity of men going between the ends of the cars.

NOTE: Sections 231.25 and 231.26 are applicable only when the vehicles governed thereby are coupled together and moved together.

APPENDIX E

List of Class I Railroads in the United States (year - 1986)

CLASS I RAILROADS AND RAILROAD SYSTEMS IN THE UNITED STATES
(Year 1986)

Atchison, Topeka and Santa Fe Railway Company
Burlington Northern Railway Company
Chicago and North Western Transportation Company
Consolidated Rail Corporation (Conrail)
CSX Corporation
  CSX Transportation, Inc. (includes Chessie System and Seaboard System)
Denver and Rio Grande Western Railroad
Elgin, Joliet and Eastern Railway
Florida East Coast Railway
Grand Trunk Corporation
  Grand Trunk Western Railroad
Guilford Industries
  Boston and Maine Corporation
  Delaware and Hudson Railway
Illinois Central Gulf Railroad
Kansas City Southern Railway
Missouri-Kansas-Texas Railroad
National Railroad Passenger Corporation (Amtrak)
Norfolk Southern Corporation
  Norfolk and Western Railway
  Southern Railway System
Union Pacific Railroad Corporation
  Missouri Pacific Railroad
  Western Pacific Railroad
Soo Line Railroad

Appendix E—List of Class 1 Railroads in the United States (year—1986).

Southern Pacific Transportation Company
St. Louis Southwestern Railway
Southern Pacific Transportation Company

NOTE: In addition to the 23 Individual Class I railroads, shown above, there are approximately 480 Class II and Class III line-haul railroads and switching and terminal companies.

APPENDIX F

List of Parent Corporations and Subsidiaries of Petitioner, Pittsburgh & Lake Erie Railroad Company

List of Parent Corporations and Subsidiaries of Petitioner, Pittsburgh & Lake Erie Railroad Company.

Pleco Inc. (Parent of P&LE RR Co.)
7th Floor Commerce Court
Pittsburgh, PA 15219

P&LE Car Management Company (wholly owned subsidiary of Pleco)
7th Floor Commerce Court
Pittsburgh, PA 15219

P&LE Land Company (wholly owned subsidiary of Pleco)
7th Floor Commerce Building
Pittsburgh, PA 15219

P&LE Coal Logistics Company (wholly owned subsidiary of Pleco)
571 East Main Street
Somerset, PA 15501

West Newton Coal Logistics Company (P&LE Coal Logistics owns 20%)
571 East Main Street
Somerset, PA 15501

Colona River Services Inc. (P&LE Coal Logistics owns 51%)
P.O. Box 100
Monaca, PA 15061

Station Square Hotel Associates (Pleco is a limited partner in this general partnership, owning 1 share)

Pocono Northeast (Pleco has a small investment interest)

Appendix F—List of Parent Corporations and Subsidiaries of Petitioner.

P&LE SUBSIDIARIES

The Mahoning State Line Railroad Company
Suite 780 Commerce Court
No. 4 Station Square
Pittsburgh, PA 15219
P&LE - 92.75%

The Monongahela Railway Company
Six Penn Center Plaza
Philadelphia, PA 19104
P&LE - 33⅓%

Montour Railroad Company
Suite 780 Commerce Court
No. 4 Station Square
Pittsburgh, PA 15219
P&LE - 100%

The Pittsburgh, Chartiers and Youghiogheny Railway Company
Six Penn Center Plaza
Philadelphia, PA 19104
P&LE - 50%

Youngstown and Southern Railway Company
Suite 780 Commerce Court
No. 4 Station Square
Pittsburgh, PA 15219
Montour - 100%